



October 30, 2002

Ms. Susan C. Rocha  
Denton, Navarro & Bernal  
1700 Tower Life Building  
310 South St. Mary's Street  
San Antonio, Texas 78205-3111

OR2002-6168

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171491.

The San Antonio Water System ("SAWS"), which you represent, received a request for copies of bills that SAWS received from two specified law firms for work performed by those firms during the months of April through July 2002. You claim that portions of the requested information are excepted from disclosure pursuant to sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.110, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the submitted attorney fee bills are subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup> As SAWS did not submit to this office written comments stating the reasons why sections 552.104 and 552.105 of the Government Code would allow this information to be withheld from disclosure, we find that SAWS has waived this exception to disclosure. See Gov't Code §§ 552.301, .302. Further, as we did not receive comments stating the reasons why section 552.110 of the Government Code would allow this information to be withheld from disclosure, we assume that this exception to disclosure is no longer being asserted by SAWS.

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in attorney fee bills must be released under section 552.022(a)(16) unless it is expressly confidential under other law. Although SAWS claims that portions of these fee bills are excepted from disclosure under sections 552.103, 552.107(1) and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions that protect the governmental body's interests and may be waived.<sup>2</sup> Accordingly, we conclude that SAWS may not withhold any portion of these fee bills under sections 552.103, 552.107(1) or 552.111 of the Government Code. We note, however, that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether any portions of these bills are confidential under rule 503 of the Texas Rules of Evidence or rule 192.5 of the Texas Rules of Civil Procedure.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). You state that portions of the fee bills at issue reveal protected communications between SAWS employees, elected officials, board members, and outside bond counsel. Based on our review of your arguments and the information at issue, we agree that rule 503 is applicable to some of this information. Accordingly, we conclude that SAWS may withhold under rule 503 the information that we have marked pursuant to that rule. However, we also conclude that SAWS has failed to sufficiently demonstrate how any portion of the remaining information at issue constitutes a confidential communication that is protected from disclosure under rule 503. Consequently, SAWS may not withhold any portion of the remaining information at issue pursuant to rule 503.

We note that an attorney’s work product is confidential under rule 192.5 of the Texas Rules of Civil Procedure. Work product is defined as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material,

communication, or mental impression was created for trial or in anticipation of litigation. *See id.* In order to show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

You state that the remaining information at issue in the submitted fee bills concerns matters that have resulted in a lawsuit, will result in litigation, or are presently in active litigation. You also contend that this information associated with these matters constitutes notations of attorney work product developed in anticipation of litigation and relating to the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Having considered your arguments and this information, we conclude that you have demonstrated that a small amount of this information is protected by the attorney work product privilege under rule 192.5. We have marked this information accordingly. However, we also find that SAWS has failed to sufficiently demonstrate that any portion of the remaining information at issue constitutes material, communications, or mental impressions created for trial or in anticipation of litigation. Consequently, SAWS may not withhold any portion of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, SAWS may withhold under rule 503 of the Texas Rules of Evidence the information that we have marked pursuant to that rule. SAWS may also withhold under rule 192.5 of the Texas Rules of Evidence the information that we have marked pursuant to that rule. SAWS must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 171491

Enc. Marked documents

cc: Mr. Carl Langlois  
11234 Jade Spring  
San Antonio, Texas 78249  
(w/o enclosures)